

ASSEMBLY BILL

No. 2717

Introduced by Assembly Member Fuentes

February 22, 2008

An act to amend Section 56505 of the Education Code, relating to special education.

LEGISLATIVE COUNSEL'S DIGEST

AB 2717, as introduced, Fuentes. Special education: due process hearing: burden of proof.

Existing law requires school districts, county offices of education, and special education local plan areas to comply with state laws that conform to the federal Individuals with Disabilities Education Act (IDEA), in order that the state may qualify for federal funds available for the education of individuals with exceptional needs. Existing law requires each noneducational and educational agency that provides education, related services, or both, to children who are individuals with exceptional needs to establish and maintain all of the procedural safeguards under IDEA, including mediation of disputes and due process hearings. Existing law prescribes procedural requirements for the hearing, including requirements that govern the decisionmaking process of the hearing officer. Existing law further provides that the requirements regarding the decisionmaking process of the hearing officer do not alter the burden of proof required in a due process hearing, or prevent a hearing officer from ordering a compensatory remedy for an individual with exceptional needs.

This bill instead would assign the burden of proof, as defined, in a due process hearing to the responsible educational agency, except with regard to the appropriateness of a unilateral parental placement or related

services in a case where the parent or guardian is seeking tuition reimbursement for the placement or services.

Vote: majority. Appropriation: no. Fiscal committee: no.
State-mandated local program: no.

The people of the State of California do enact as follows:

1 SECTION 1. Section 56505 of the Education Code is amended
2 to read:
3 56505. (a) The state hearing shall be conducted in accordance
4 with regulations adopted by the board.
5 (b) The hearing shall be held at a time and place reasonably
6 convenient to the parent or guardian and the pupil.
7 (c) (1) The hearing shall be conducted by a person who, at a
8 minimum, shall possess knowledge of, and the ability to
9 understand, the provisions of this part and related state statutes
10 and implementing regulations, the federal Individuals with
11 Disabilities Education Act (20 U.S.C. Sec. 1400 et seq.), federal
12 regulations pertaining to the act, and legal interpretations of this
13 part and the federal law by federal and state courts, and who ~~has~~
14 satisfactorily *has* completed training pursuant to this subdivision.
15 The Superintendent shall establish standards for the training of
16 hearing officers, the degree of specialization of the hearing officers,
17 and the quality control mechanisms to be used to ensure that the
18 hearings are fair and the decisions are accurate.
19 (2) The hearing officer shall possess the knowledge and ability
20 to conduct hearings in accordance with appropriate, standard legal
21 practice.
22 (3) The hearing officer shall possess the knowledge and ability
23 to render and write decisions in accordance with appropriate,
24 standard legal practice.
25 (4) A due process hearing shall not be conducted by an
26 individual listed in Section 1415(f)(3)(A)(i) of Title 20 of the
27 United States Code. Pursuant to Section 300.511(c)(2) of Title 34
28 of the Code of Federal Regulations, a person who is qualified to
29 conduct a hearing is not an employee of the agency solely because
30 he or she is paid by the agency to serve as a hearing officer. The
31 hearing officer shall encourage the parties to a hearing to consider
32 the option of mediation as an alternative to a hearing.

(d) Pursuant to Section 300.518(a) of Title 34 of the Code of Federal Regulations, during the pendency of the hearing proceedings, including the actual state-level hearing, or judicial proceeding regarding a due process hearing, the pupil shall remain in his or her present placement, except as provided in Section 300.533 of Title 34 of the Code of Federal Regulations, unless the public agency and the parent or guardian agree otherwise. A pupil applying for initial admission to a public school, with the consent of his or her parent or guardian, shall be placed in the public school program until all proceedings have been completed. As provided in Section 300.518(d) of Title 34 of the Code of Federal Regulations, if the decision of a hearing officer in a due process hearing or a state review official in an administrative appeal agrees with the parent or guardian of the pupil that a change of placement is appropriate, that placement shall be treated as an agreement between the state or local educational agency and the parent or guardian. In accordance with Section 300.518(c) of Title 34 of the Code of Federal Regulations, if a due process hearing request involves an application for initial services from a child who is transitioning from an early education program under Chapter 4.4 (commencing with Section 56425) to a special education program serving individuals with exceptional needs between the ages of three to five years, inclusive, under Chapter 4.45 (commencing with Section 56440), and is no longer eligible for early education services because the child has turned three years of age, the local educational agency is not required to provide early education services that the child had been receiving. If the child is found eligible for special education and related services for children age three years of age and older, and the parent or guardian consents to the initial provision of special education and related services under Section 300.300(b) of Title 34 of the Code of Federal Regulations, the local educational agency shall provide those special education and related services that are not in dispute between the parent or guardian and the local educational agency.

(e) A party to the hearing held pursuant to this section shall be afforded the following rights consistent with state and federal statutes and regulations:

(1) The right to be accompanied and advised by counsel and by individuals with special knowledge or training relating to the problems of individuals with exceptional needs.

1 (2) The right to present evidence, written arguments, and oral
2 arguments.

3 (3) The right to confront, cross-examine, and compel the
4 attendance of, witnesses.

5 (4) The right to a written, or, at the option of the parents or
6 guardians, electronic verbatim record of the hearing.

7 (5) The right to written, or, at the option of the parent or
8 guardian, electronic findings of fact and decisions. The record of
9 the hearing and the findings of fact and decisions shall be provided
10 at no cost to parents or guardians in accordance with Section
11 300.512(c)(3) of Title 34 of the Code of Federal Regulations. The
12 findings and decisions shall be made available to the public after
13 any personally identifiable information has been deleted consistent
14 with the confidentiality requirements of Section 1417(c) of Title
15 20 of the United States Code and *also* shall ~~also~~ be transmitted to
16 the Advisory Commission on Special Education pursuant to Section
17 1415(h)(4) of Title 20 of the United States Code.

18 (6) The right to be informed by the other parties to the hearing,
19 at least 10 days prior to the hearing, as to what those parties believe
20 are the issues to be decided at the hearing and their proposed
21 resolution of those issues. Upon the request of a parent who is not
22 represented by an attorney, the agency responsible for conducting
23 hearings shall provide a mediator to assist the parent in identifying
24 the issues and the proposed resolution of the issues.

25 (7) The right to receive from other parties to the hearing, at least
26 five business days prior to the hearing, a copy of all documents
27 and a list of all witnesses and their general area of testimony that
28 the parties intend to present at the hearing. Included in the material
29 to be disclosed to all parties at least five business days prior to a
30 hearing shall be all assessments completed by that date and
31 recommendations based on the assessments that the parties intend
32 to use at the hearing.

33 (8) The right, pursuant to Section 300.512(a)(3) of Title 34 of
34 the Code of Federal Regulations, to prohibit the introduction of
35 any evidence at the hearing that has not been disclosed to that party
36 at least five business days before the hearing.

37 (f) (1) In accordance with Section 1415(f)(3)(E) of Title 20 of
38 the United States Code, the decision of a due process hearing
39 officer shall be made on substantive grounds based on a

1 determination of whether the child received a free appropriate
2 public education.

3 (2) In matters alleging a procedural violation, a due process
4 hearing officer may find that a child did not receive a free
5 appropriate public education only if the procedural violation did
6 any of the following:

7 (A) Impeded the right of the child to a free appropriate public
8 education.

9 (B) Significantly impeded the opportunity of the parents to
10 participate in the decisionmaking process regarding the provision
11 of a free appropriate public education to the child of the parents.

12 (C) Caused a deprivation of educational benefits.

13 (3) The hearing conducted pursuant to this section shall be
14 completed and a written, reasoned decision, including the reasons
15 for a nonpublic, nonsectarian school placement, the provision of
16 nonpublic, nonsectarian agency services, or the reimbursement for
17 the placement or services, taking into account the requirements of
18 subdivision (a) of Section 56365, shall be mailed to all parties to
19 the hearing not later than 45 days after the expiration of the 30-day
20 period pursuant to subdivision (c) of Section 56501.5. Either party
21 to the hearing may request the hearing officer to grant an extension.
22 The extension shall be granted upon a showing of good cause. An
23 extension shall extend the time for rendering a final administrative
24 decision for a period only equal to the length of the extension.

25 (4) This subdivision does not preclude a due process hearing
26 officer from ordering a local educational agency to comply with
27 procedural requirements under this chapter.

28 ~~(g) Subdivision (f) does not alter the burden of proof required~~
29 ~~in a due process hearing, or prevent a hearing officer from ordering~~
30 ~~a compensatory remedy for an individual with exceptional needs.~~

31 *(g) (1) The responsible educational agency shall have the*
32 *burden of proof in the hearing conducted pursuant to this section,*
33 *except with regard to the appropriateness of a unilateral parental*
34 *placement or related services in a case where the parent or*
35 *guardian is seeking tuition reimbursement for the placement or*
36 *services.*

37 *(2) For purposes of this subdivision, "burden of proof" includes*
38 *the burden of persuasion and the burden of production.*

39 (h) The hearing conducted pursuant to this section shall be the
40 final administrative determination and binding on all parties.

1 (i) In decisions relating to the placement of individuals with
2 exceptional needs, the person conducting the state hearing shall
3 consider cost, in addition to all other factors that are considered.

4 (j) In a hearing conducted pursuant to this section, the hearing
5 officer shall not base a decision solely on nonsubstantive
6 procedural errors, unless the hearing officer finds that the
7 nonsubstantive procedural errors resulted in the loss of an
8 educational opportunity to the pupil or interfered with the
9 opportunity of the parent or guardian of the pupil to participate in
10 the formulation process of the individualized education program.

11 (k) This chapter does not preclude a party aggrieved by the
12 findings and decisions in a hearing under this section from
13 exercising the right to appeal the decision to a state court of
14 competent jurisdiction. An aggrieved party also may exercise the
15 right to bring a civil action in a district court of the United States
16 without regard to the amount in controversy, pursuant to Section
17 300.516 of Title 34 of the Code of Federal Regulations. An appeal
18 shall be made within 90 days of receipt of the hearing decision.
19 During the pendency of an administrative or judicial proceeding
20 conducted pursuant to Chapter 5 (commencing with Section
21 56500), the child involved in the hearing shall remain in his or her
22 present educational placement, unless the public agency and the
23 parent or guardian of the child agree otherwise. An action brought
24 under this subdivision shall adhere to Section 300.516(c) of Title
25 34 of the Code of Federal Regulations.

26 (l) A request for a due process hearing arising under subdivision
27 (a) of Section 56501 shall be filed within two years from the date
28 the party initiating the request knew or had reason to know of the
29 facts underlying the basis for the request. In accordance with
30 Section 1415(f)(3)(D) of Title 20 of the United States Code, the
31 time period specified in this subdivision does not apply to a parent
32 if the parent was prevented from requesting the due process hearing
33 due to either of the following:

34 (1) Specific misrepresentations by the local educational agency
35 that it had solved the problem forming the basis of the due process
36 hearing request.

37 (2) The withholding of information by the local educational
38 agency from the parent that was required under this part to be
39 provided to the parent.

1 (m) Pursuant to Section 300.511(c) of Title 34 of the Code of
2 Federal Regulations, each public agency shall keep a list of the
3 persons who serve as due process hearing officers, in accordance
4 with Section 56504.5, and the list shall include a statement of the
5 qualifications of each of those persons. The list of hearing officers
6 shall be provided to the public agencies by the organization or
7 entity under contract with the department to conduct due process
8 hearings.

9 (n) A party who filed for a due process hearing prior to the
10 effective date of this section is not bound by the two-year statute
11 of limitations time period in subdivision (l) if the party filed a
12 request within the three-year statute of limitations provision
13 pursuant to subdivision (l) as it read prior to October 9, 2006.

14 (o) This section shall become operative October 9, 2006.